United States Court of Appeals

for the Second Circuit

REPLY BRIEF

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-v- :

MICHAEL GARDNER, :

Appellant. :

----------X

76-1339

REPLY BRIEF FOR APPELLANT MICHAEL GARDNER

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REPLY BRIEF FOR APPELLANT MICHAEL GARDNER

Point I

The Caffrey Report Completely Disposes of the Government's Contentions on the Competency Point.

We answer first the last point in the Government's Brief because it is so easily disposed of.*

The crux of the Government's opposition to the competency motion is found at G Br 61. These are:

(a) That the motion was untimely and not made in good faith. These points are completely disposed of by the Caffrey report's statement that there was no basis for "a possible suspicion that Mr. Gardner's current condition is

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* G Br herein stands for the Government's Brief; D Br, our main brief; and S A the Supplemental Appendix to this brief. Otherwise we use the designations in our main brief.

primarily motivated as part of a defense strategy" (A 41, D Br 44). Timeliness, moreover, in this context, is senseless. Competency problems must be dealt with when they appear -- even at trial if that's when they come.

(b) That the motion "was without sufficient factual allegations to warrant a hearing or examination." For this the Government relies on the part of the Caffrey report showing "no organic impairment, deteriorative-type loss of functioning, or schizophrenic-like thought disorder" G Br 59). While this showed that Gardner probably could "understand" the charges, it did not negate the claim that he could not properly assist in his defense; and the rest of the report, which the Government fails to mention, makes so clear that this was an issue for which a psychiatric examination was required.

This must be so. We cannot imagine this Court accepting an argument that no such examination is required when the Chief Psychologist at the MCC, a Government facility, reporting to the Court for purposes of the Court's determining whether an examination is in order, reports that Gardner is actively suicidal, is one of the three or four worst residents in those terms, and recommends that the Court pay utmost seriousness to the question.

(c) That Gardner's conduct at trial showed his competency. In the first place, no amount of observations by the district court could overcome Dr. Caffrey's report.

The district court was observing Gardner's actions externally. Caffrey was trained to, and was observing, Gardner internally. Only a qualified psychiatrist, not the district court, could say whether Gardner's actions were what they seemed on the surface. The world, as this Court well knows, is filled with people who appear on the surface to be functioning normally, yet are in fact mentally incompetent. See Saddler v. United States, 531 F.2d 83 (2d Cir. 1976) (seeming rationality at time of guilty plea can be called into question by later events).

Second, Gardner's actions at trial, far from evidencing rationality, confirmed irrationality. After all the work his counsel went through to secure the videotaped deposition of Braunig in Canada (G Br 56*), Gardner refused to waive his own appearance (D Br 42). His counsel told the Court that his actions in this regard were irrational and that Gardner was not competent. The Court observed his crazy behavior at this point (9).

Gardner, moreover, according to the Government (G Br 56), gave six days of fabricated testimony. What possibly could have been more "suicidal" than for him to do that?

Finally, the Court's observations that Gardner was competent in the latter part of the trial could not answer the question about Gardner's competency at the early part. We note that as late as the fourth day (April 29) the Court saw fit to alert the warden at the MCC about possible suicides, and told the United States Marshals to "exercise care in view

of these windows being open and that sort of thing and in terms of having custody of him . . . So the marshals have been alerted because we wouldn't want any mishap here" (535-36). Gardner was entitled to a trial at which he was competent throughout, not merely in the last days.

To summarize: the only issue is whether the district court should have ordered a psychiatric examination. Faced with the Caffrey report, and the other indications we cited at D Br 44, the conclusion is inescapable that it erred in refusing to do so.

Point II

The Government's Proof on White and Porklean Varied From the Charge in the Indictment. The Government Never Proved That Gardner Had No Intention of Handling the Transactions.

The indictment charges that when Gardner took the advance fees on White and Porklean, he had "no honest expectation that the proposed financing would or could be obtained and had neither the capacity nor the intention to obtain it." (A9). The Government admits now that it failed to prove that. The fraud, it now says (G Br 31), inhered in Gardner's false representations (a) that he was a successful expert in raising capital in Europe, and (b) that he would use their money, together with $25,000 of his own, to cover the start-up expenses.

These counts must be dismissed. The Government is not free to prove what it wants. It must prove what the

indictment charges -- that Gardner had "no intention" of doing the offerings. This it has not done. Stirone v. United States, 361 U.S. 212, 217 (1960); United States v. Epstein, 174 F.2d 754 (6th Cir. 1949).

But the Government failed to prove even these. Gardner was working through Kirby. Kirby stated specifically that he had distributed stock previously in Europe, with success (D Br 17). Kirby was the Government's witness.*

As to the use of the monies, in arguing that Gardner spent the money for his personal use, the Government makes reference only to the Deak Bank records (G Br 11*), into which the monies were initially deposited. But Gardner was continually writing checks from numerous other accounts for the White and Porklean expenses. The agreement with White, moreover, did not obligate Gardner to keep these funds separate. It provided solely that White had deposited $25,000 with Gardner "for the due performance of this contract", which Gardner was to return if he failed to perform (A 54).

Though we have said enough to show that these counts must be reversed, we add these comments on the Government's misstatements of fact:

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* The Government embraces Kirby's testimony where it helps, but rejects it when it supports Gardner, for example, on his European trip (G Br 32*).

(a) That Gardner "did nothing further beyone those superficial steps necessary to maintain the appearance that he was doing something" (G Br 7). On the contrary, the proof was clear from Kirby that Gardner did everything except the last step (D Br 17-21).

(b) That Gardner never "properly used a penny" of the White monies (G Br 8). Even using just the Deak's Bank account where the White money was deposited, the Government itself had it that Gardner spent about $1750 for "White and Allen business expenses", and spent another $4000 for Kirby, Clements and Riley, who were to help him on the two offerings. Numerous other expenses were paid from other accounts.

(c) That Gardner "approached" Allen on Porklean (G Br 9) and "induced" him to become his next victim (G Br 7). Allen testified that on February 6 (before the White check of February 18, or the White agreement of February 28), he raised the question of a Porklean financing with Clements, Gardner's associate: "I was interested and wanting to find if he would be interested in doing some similar type of financing" (163).

Point III

The Elements of Alleged Fraud In Fun Tyme Were Shown To Be Non-Fraudulent By Uncontroverted Evidence.

The Government has changed its position on Fun Tyme as well.

The indictment asserts that Gardner had no intention of obtaining the financing. Clearly, however, there was activity which is reflected in Gardner's initial telex to Ivanoff of January 27 (A 151-52), and the host of communications thereafter; Ivanoff's visits to Bank of New York on the deal (the Government itself brought this out); retaining the attorney Carr; Vigevani's trip to New York; and even ultimately issuing the letters. We describe these at D Br 22-24.

The Government answers:

1. Gardner was only "tangentially involved in . . . these efforts" (G Br 33). The argument is nonsense. Gardner started the wheels turning (A 151), and kept his hand in all the way through (A 159). He was not more involved only because, as the Government notes in its later discussion of Rupe (G Br 25, 54), he was engaged in a federal trial. In any event, he was under no obligation personally to attend to the work. He could act through agents, associates and subordinates.

2. The Government now admits essentially that since efforts were made, it did not prove its charge in the indictment

that Gardner had no intention, when he accepted Fun Tyme's check, in going through with the deal. Its present claim is that the fraud inhered in Gardner's promise that he could supply $500,000 on $200,000 collateral, and could do so in ten days (G Br 33).

Uncontroverted evidence defeats these arguments. When the ten days came and went, and the letters had not arrived, Fun Tyme did not withdraw from the transaction and demand its money back. It continued for weeks thereafter to negotiate with Carr (D Br 23). It bought a ticket for Vigevani to come to New York on February 26 (G X 114, S A 1). It did not send its demand for repayment of the $7500 fee until months later (G X 99) This is clear evidence that Fun Tyme as well understood that the ten days was a target -- not an essential -- and that its non-fulfillment did not even give grounds for charges in the civil courts, no less sounding in criminal.

As to the collateral, the Government fails to mention that on February 19, 1975, Fun Tyme itself modified the January 15 contract by agreeing to post $300,000 additional collateral in the form of its accounts receivable (X F C, S A 3), something which the New York banks had apparently found unacceptable.* Parker testified, moreover, that Fun Tyme was still "quite anxious" to do the deal "in the middle

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* This further evidences, as well, our point that the ten-day feature was a target, not a firm date.

of February or . . . beginning of March" on the basis of the receivables collateral (1486). Again, this evidences an understanding that the collateral question was one the parties understood might have to be modified as circumstances dictated.

3. The Government cites as a "flagrant lie" Gardner's January 29 letter saying the letters of credit had been sent to the beneficiaries (G Br 34). It is unconscionable that the Government should omit references to Gardner Exhibit FV (A 184), a telex Gardner received from Switzerland on January 28, assuring him that the letters of credit would be in the mail to the beneficiaries the next day. Parker's testimony was quite specific (1480). He asked Gardner if the letters had been issued. Gardner said "they are issued and on the way", obviously relying on the prior telex. Parker then asked Gardner to send him a letter to that effect so that he, Parker, could show that letter to the creditors (1480). This is why Gardner sent the January 29 letter.

4. The Government states that the only thing Gardner ever produced was the same financing Fun Tyme could have "obtained from any local bank" (G Br 34). Again the testimony was undisputed that the Bank Fiduciare was prepared to put up the additional $300,000 on a receivable financing basis, that there were negotiations on that (1397), at least 12 in number (1483) and that the negotiations on that fell through only because of Fun Tyme. This is not what Fun Tyme

could have gotten from any local bank. Moreover, even when the letters were to be valid only for 40% of the face amount of $500,000, without the extra collateral, the idea was that the Bank might well allow Fun Tyme to go beyond -- more than a local bank would do.

We also treat the Government's errors in its factual statement.

The Government mentions that Gardner immediately spent the $7500 fee (G Br 22). He was entitled to do so. This was a fee for finding financing.

The Government challenges Ivanoff and the Bank Fiduciare. The record references are solely certain hearsay and opinion statements of Van Marx, an officer of Bank of New York. There is not a shred of competent proof that Fun Tyme's requirements would not have been served by letters of credit of Bank Fiduciare.*

The Government recites that Gardner refused to refund the money (G Br 24). But it was Fun Tyme that reneged, and the January 15 agreement specifically gave Gardner the right to keep the fee in that event.

To summarize: The Government admits now that it failed to prove that Gardner had no intention of obtaining the letters of credit. This is fatal to its case. And even if it can fall back to the ten-day and collateral points, it failed also to prove these beyond a reasonable doubt.

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* The 1973 asset figure was not pertinent (G Br 22**) on the status of letters of credit in 1975, which would have both assets and deposits behind them.

Point IV

Myrtle Rupe Concealed Vital Facts From Gardner. The Government's Proof Was Not Sufficient to Show An Intent to Defraud Her.

The Government has not answered our arguments on the Rupe transaction. Mrs. Rupe came to Gardner with a presentation which was wholly false. As we showed (D Br 27), Rupe would not have given Gardner $14,000 unless she was convinced he didn't know the facts. Why give Gardner $14,000 for a commitment she knew he couldn't get?

The testimony is exactly this (D Br 27). She didn't tell him the club was closed. "He didn't ask me." She didn't tell him it had no members. "He didn't ask me." She didn't tell him about the financial statement. "It was not mentioned" (1892).

There is not the slightest bit of proof that at the time Gardner entered into the agreement, the only time in question, he could not get a commitment. On the contrary, on the papers represented by Rupe he could get it, and it becomes impossible to get only by reference to the true facts, which, however, were concealed from Gardner. The Government argues that there was fraud (G Br 26**) because Ekalb made the commitment and Ekalb is a shill. The agreement was that Ekalb would arrange the commitment through an insurance company. Since Ekalb was only a finder, its financial standing made no difference.

The Government argues that it is "absurd" to say that Ekalb could produce a letter of intent in three days (Ibid). This Court knows that if a deal is right, a letter of intent for commitments larger than this can be produced in twenty-four hours, no less in three days, reciting, of course, that it is subject to verification of the facts, etc.

The Government finds "most blatant" of all Ekalb's agreement in Paragraph 15 to fund the commitment if asked, for a fee of $7500 (A 96). But obviously all this meant was that if the insurance company reneged on the commitment, Gardner would go to another source of funds, for an additional fee.

The Government attacks Gardner's spending the $14,000 fee (G Br 25). Gardner was entitled to. It was his fee, not expense money, and the agreement clearly delineated between the two in Paragraph 11 (A 95), noting: "The borrower shall pay all costs and expenses incidental to this commitment. The commitment fee shall be seven (7) per cent." Gardner was not required to keep the funds in escrow, and Lofland's statement that he would keep the funds in a special account did not bind him.

The Government cites Gardner's remarks in April that he had in fact obtained the commitment (G Br 27-28). These remarks came two months afterward. They came after Gardner found out about Rupe's fraud, and that she had reported him to the FBI. Standing alone, or even with the

other proof, they are wholly insufficient to prove beyond a reasonable doubt that Gardner defrauded Rupe.

The Government's brief has put its best foot forward at pages 24-28, 34-35. In that recitation this Court will not find any facts which establish beyond a reasonable doubt that Gardner, at the time he signed the February 18 agreement, knew he could not obtain a loan on the Coronado Country Club.

Point V

The Barclay's Bank Scheme Was Founded On Braunig's Direct Dealings With The Tellers, Not The Mails. Accordingly, The Maze Doctrine Applies.

The Government's response to our United States v. Maze, 414 U.S. 395 (1974) argument (D Br 29) makes perfectly clear why we, not the Government, should prevail.

The Government concedes that the cases decided since Maze which have refused to follow it were "standard check-kiting frauds" (G Br 40). In such frauds the defendant merely deposits the checks in the first bank and has no contact with the bank beyond that." Here, however, as the Government goes to great lengths to demonstrate (G Br 38-39), the key to the scheme "was trying to induce some bank employee to wrongly credit the checks under one of the standard 'automatic' rules" (G Br 39). The Government recites Braunig's

extended "[direct] dealing[s] with various tellers at various Barclay's branches." (G Br 39)

In other words, this case is in accord with Maze where the alleged fraud consists of what takes place when an instrument is presented (there, a credit card; here, inducing a check to be taken for deposit, not collection), and where the mailing, rather than completing the scheme, in fact defeats it.

With respect to the facts, the Government's theory of an "error-prone" bank, on which Gardner had "tested the waters" is shown, on the Government's own case, to be without support (G Br 17). The Government's main witness was Mrs. Naim, an officer of the Bank. Her testimony was clear that because of the prior problems with Gardner (outlined at G Br 17*), the Bank was being extra careful with his accounts, and he knew it. She testified to her repeated calls to Gardner (before the forged check episode) and her repeated conversations with Braunig (before the forged check episode) about those problems. The bank was even suing Gardner because of the $5,000 certified check episode (D Br 34) and was disputing with him about the charge to his account for the Ekalb overdraw (Ibid).

Point VI

The Government Has Misstated The Record Both On The Prior Convictions And On The Similar Acts.

A. The Convictions

The Gardner convictions were devastating. The Government has offered a so-called history (G Br 47-50), and three further justifications (G Br 51). None have merit.

The history is factually wrong. Gardner's "lie" to Allen (G Br 47) did not come after Allen's March 22 letter, as the Government asserts. It came before. On March 22 Allen knew that Gardner had been convicted. His letter says exactly that (A 150): "We have received confirmation that you do have, are involved, in fact, in some serious legal problems." (Emphasis supplied.) He adds, moreover: "We are not particularly concerned." Thus, the alleged Gardner "lie" that another Gardner was involved could not possibly have led Allen to give another $5,000 on April 1 in connection with the so-called advance fee scheme.

Allen, contrary to the Government (G Br 51), did not say that because he believed Gardner's lie he sent the money to Kirby. He said that he sent the money to Kirby because Kirby called him, told him he was stranded in Europe without money, and since he was "afraid of the whole thing going down the drain", he decided to see "if Kirby can perform" (377-78). The Government's statement that Allen said

anything more is unwarranted and based on a leading question of the Assistant, which was his testimony, not Allen's (377).

This was not a credibility question. The matter is that the Government led the Court to permit it to give "negative information" testimony (G Br 49), which was prejudicial, and then the actual conviction testimony, even more prejudicial, and even the convictions themselves (D Br 36) on the basis that Gardner's denial led Allen to advance the second $5,000. But in view of the March 22 letter, it could not possibly have done so.

Contrary to G Br 51, there must be reliance on the alleged later fraudulent statement, as shown by the Government's extensive quote at G Br 31 from United States v. Painter, 314 F.2d 939 (4th Cir. 1963). Moreover, having misled the Court, over Gardner's objections, to admit the convictions, the Government can hardly claim at this point that Gardner was obliged to spread on the record the influence this error had on his trial strategy. Beyond question, anything so devastating in the two convictions had to influence his decision to testify.

B. The Similar Acts

The Government says we have distorted the record and that the only similar act testimony was the Worldwide securities and the Canadian check kiting schemes (G Br 42).

What about the forgeries of the Kirby checks; the Ohio Corrugated matter; the Royal Airlines fraud; the testimony of an office temporary that she was "never" to listen to the answering machine, "never" to give out any information, "never" to open the mail, "never" to touch anything on the top of the desk; that she was to pretend to be a Mrs. Morrison in charge of personnel; that there was a particular phone for Gardner's wife Judith because Gardner was not on good terms with her; that she was asked to lie about monies owed to some unnamed stock brokerage firm, but refused to do so because it was against her religion; and that some of the checks given her in payment bounced (1333-37, 1346-49) (D Br 35).

As to the Barclay's Bank testimony, the Government is wrong in suggesting that the so-called fictitious name business of Count 13 ever justified the proof of Gardner's bounced checks at Barclay's (G Br 46). But even if it did, and even if the proof could be considered on the "error prone" theory of Counts 5 and 6, this but makes our point at D Br 30-31. Counts 5 and 6 were not just presenting two forged checks. They were in effect presenting "a number of insufficient check" charges (G Br 17) of major proportions and extensive proof; so that in effect, the indictment was not joining fifteen different charges in one trial as we initially said (D Br 30), but some twenty or more. Whether labeled "similar acts" under the indictment joinder, or as such, the effect is exactly the same -- an overmastering hostility which made a fair trial impossible.

CONCLUSION

We close with these responses:

(a) The district court could not exclude testimony of Gardner's wife unless it found that he or his counsel procured her violation of the exclusion order (D Br 39). Unlike the cases the Government cites (G Br 53), the Court here made no such finding, resting solely (as it was not entitled to do) on the exclusion order. There is no room in this area to talk of "discretion" (G Br 53).

No offer of proof beyond that made by counsel was necessary. Taylor v. United States, 388 F.2d 786 (9th Cir. 1967). And counsel could not be held to have known of the need for her testimony.

(b) As to the Bill of Particulars, it should be obvious from our earlier discussion that the Bill was vital to counsel's argument that the Government's charge in the indictment was that Gardner had no intention of doing the various transactions, and that the charges had to be dismissed if this was not proved. The fact that the Government even now is changing its theory of the case makes perfectly clear that the district court unfairly prejudiced counsel's argument by its ruling.

(c) The Government admits at G Br 37 that it did not prove that Gardner was responsible for Braunig's allegedly false statements in her initial applications. It admits that during 1972, 1973 and into 1974 payments were

made and that it was not until 1974 and 1975, when Gardner was broke, that the defaults occurred. The proof was ample, moreover, that the companies knew that Gardner was now using the cards and knew to make inquiries of him (e.g., G Br 16*).

In the face of these concessions, the notion that the stores were defrauded by a fictitious name use is ridiculous.

The Gardner conviction should be reversed.

Respectfully submitted,

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Michael Gardner

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Suite: 1505

Dear Mr. Gardner:

At the request of Mr. Scott Grody, I am herewith enclosing a copy of ticket number 8012:556:578, issued in the name of Maurizio Vigeuani for air transportation Geneva to New York on February 26, 1975, and in the amount of $811.80.

Yours truly,

RELIABLE TRAVEL BUREAU

Ed Chanes

Ed Chanes, Manager
ec/hns
encl.

SA 2

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25-07

DATE OF ISSUE 25 FEB 75

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TOTAL VALUE 1997.SFR

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COMMN. RATE 7%

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1824 KINGS HIGHWAY
BROOKLYN, NEW YORK 11229
212 - 627-2243

Gardner X F C

S A 3

SCOTT H. GRODY
PRESIDENT

February
19th
1975

In consideration of the issue of Guarantee Letters of Credit which shall be irrevocable "clean" documents, and shall be drawn on a qualified Swiss banking institution, in accordance with the Uniform Custom and Practice for Documentary Credits (1962 Revision) International Chamber of Commerce Brochure No. 222. The purpose of said Letters of Credit is to guarantee payment by FUN-TYME and thereby to comply with the various contracts into which it must enter in order to conduct its ordinary business.

FUN-TYME shall post a non-interest bearing deposit of $200,000 U.S., which shall be hypothicated against the guarantees discussed above only. This deposit will be posted at a New York bank, which will act as agent for the Swiss bank with a correspondent relationship. FUN-TYME shall have the right to approve this bank.

(continued...

EXECUTIVE OFFICES
FUN-TYME TOURS

FUN-TYME PACKAGES
INCORPORATED
1824 KINGS HIGHWAY
BROOKLYN, NEW YORK 11229
212 - 627-2243

SCOTT H. GRODY
PRESIDENT

FUN-TYME does further assign its Accounts Receivables effective the date of the issuance of said Letters of Credit in the amount of three hundred ($300,000.00) thousand dollars, which said assignment shall be a continuing lien against the accounts receivable of FUN-TYME PACKAGES, INC. as long as the aforesaid Letters of Credit are in force and effect.

The collateral posted by FUN-TYME can be forclosed without further notice except as expressed in the Bulletin of the International Chamber of Commerce No. 222 (1964 Revision). It is understood that said forclosure can be commenced immediately upon FUN-TYME being in default on any of these agreements which would in effect create a draft against these credits for the amount of this draft plus expenses and charges as expressed by the above cited bulletin.

Sincerely,

Scott H. Grody
President

/rw